AUGUST 2024 ESG POLICY UPDATE – AUSTRALIA

Date: 12 September 2024

Australia Environmental Social Governance (ESG) Alert

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AUSTRALIAN UPDATE

Guide to Sustainable Collaborations – ACCC

On 8 July 2024, the Australian Competition & Consumer Commission (ACCC) published a draft guide on Sustainability collaborations and Australian competition law for consultation (Guide).

The ACCC defines 'sustainability collaborations' as 'discussions, agreements or other practices amongst businesses which are aimed at preventing, reducing or mitigating the adverse impact that economic activities have on the environment.'

The purpose of the Guide is to assist businesses considering working together to achieve positive environmental outcomes and to understand:

- When collaboration is likely to breach and not breach Australian competition law; and
- Whether the businesses may have the option to seek an exemption through ACCC 'authorisation' when there is a risk of breaching the *Competition and Consumer Act 2010* (Cth) (Act).

The Guide provides practical tips and case studies to help businesses understand their obligations under the Act.

In preparing the Guide, the ACCC considered cartel conduct and other anti-competitive practises which have the purpose, effect or likely effect of substantially lessening competition in the Australian market.[1]

The ACCC warns that a cartel is likely where the collaboration relates to or affects, among other things, the prices that the business and their competitors charge or pay, which markets they will or won't operate in or which customers or suppliers the business will or won't deal with.

The ACCC also considered other anti-competitive behaviour, noting that a sustainability collaboration is more likely to substantially lessen competition where it, among other things, prevents businesses from competing effectively and makes it difficult for new businesses to start competing or existing businesses to expand.

If businesses consider there is a risk that their proposed sustainability collaboration may breach the prohibitions of cartel conduct or other anti-competitive practices in the Act, they may seek an exemption from the ACCC by applying for 'authorisation'.[2]

Broadly, the ACCC may grant authorisation if it is satisfied that the likely public benefit resulting from the proposed conduct or agreement outweighs the likely public detriment.[3] Once authorisation is granted, businesses can implement their collaboration without risk of the ACCC, or third parties, taking legal action against them for a breach of the competition provisions in the Act.

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The ACCC has provided the following examples of low-risk sustainability collaborations:

- Jointly funded research into reducing environmental impact;
- Pooling information about the environmental sustainability credentials of suppliers;
- Industry-wide emissions reduction targets; and
- Independent decisions about using sustainable inputs.

Feedback on the Guide closed on 26 July 2024.

Australia Supports Indonesia's Orange Bond Initiative

Nuveen and Australia and New Zealand Banking Group have joined forces with the Australian Department of Foreign Affairs and Trade (DFAT) to support Indonesia with raising AU$1.5 billion in gender-based capital by 2025 through Impact Investment Exchange's (IIX) Orange Bond Initiative. The initiative was founded by IIX in 2022 as part of its sustainability and gender equality program, of which DFAT is a member of the steering committee and has helped to develop a set of global principles for 'gender bonds'.

The Orange Bond Initiative is the world's first asset class built by and for countries considered to have a low level of economic and industrial development that aims to:

- Build a financing system that complies with global standards and performance metrics for investing in gender equality;
- Mobilise new sources of capital for women's empowerment; and
- Deploy capital in a way that harnesses the role of women in providing environmental, social and governance solutions.

The Orange Bond Initiative supplements sovereign green bond programs (discussed here) to assist countries achieve the United Nations' Sustainable Development Goals (UN SDG) and allow investors to ensure proceeds are used in a way that aligns with their values.

DFAT's involvement is part of the Australian Government's ongoing commitment to promote gender equality and the empowerment of women, girls, and persons of diverse gender identities within the Indo-Pacific region. Through the Orange Bond Initiative, DFAT strives to meet UN SDG 5 by advancing women's economic empowerment, enhancing women's leadership and strengthening women's access and influence on essential services, including health and education, within the region.

IIX will work with stakeholders, both private and government, to help structure and issue orange bonds. The bond size, tenor and coupon rate is expected to be consistent with existing sovereign green bond issuances.

The Orange Bond Initiative follows Iceland becoming the first country to launch a sovereign gender bond in June, supporting gender-based capital deployment in 2024. For more on gender-based investment, see our March ESG update.

Environmental Futures Launch on the ASX

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In a push to support investors through the energy transition, the Australian Securities Exchange (ASX) has listed a suite of environmental futures contracts on ASX 24 covering:

- Australian Carbon Credit Units (ACCUs);
- Large Generation Certificates (LGCs); and
- New Zealand Units (NZUs).

Available to wholesale investors only, each environmental futures contract is standardised, with one contract being equal to 1,000 underlying units for each of ACCUs, LGCs and NZUs. The environmental futures are listed on an annual basis out to five years, creating a liquid forward curve intended to improve price and data transparency in the market.

Those holding positions at expiry will be required to either deliver or take delivery of underlying certificates or units. The delivery process is facilitated by ASX Clear (Futures) and takes place in the relevant registry for ACCUs (Australian National Registry of Emissions Units), LGCs (renewable energy certificates registry) and NZUs (New Zealand Emissions Trading Register).

Carbon offsets support the energy transition by directing funds to renewable energy projects and decarbonisation efforts whilst allowing entities to meet their emissions targets. With much of the private sector committing to achieving net-zero emissions by 2030 or 2050, there has been a steady rise in investment managers looking to utilise emissions and environmental units (including ACCUs) to offset their own emissions. This new market will provide an opportunity for participants to price and hedge emissions reduction risk.

Read our thoughts on the launch here and our detailed explanation of the Australian carbon offset regulatory framework here.

Landmark Greenwashing Court Action Results in Hefty Penalty for Superannuation Trustee

On 2 August 2024, the Federal Court of Australia handed down its judgment ordering a major superannuation trustee to pay a AU$11.3 million penalty and to publish an adverse publicity notice after it admitted it made misleading statements about the sustainable nature and characteristics of some of its superannuation investment options.

The court action, launched by the Australian Securities and Investments Commission (ASIC) in February 2023, was the first of several civil proceedings initiated by ASIC in its efforts against misleading marketing and greenwashing (see our initial update on the court action here).

The superannuation trustee had stated in its marketing materials for seven of its sustainability-focussed investment options that it had excluded investments in companies involved in carbon-intensive fossil fuels, alcohol production and gambling. The Court found that members who took up these investment options had investments in:

- 15 companies involved in, or deriving profit from, the extraction or sale of carbon-intensive fossil fuels;
- 15 companies involved in alcohol production; and

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- 19 companies involved in gambling.

When handing down his decision, Justice Christopher Horan remarked, '*The contraventions … admitted are serious. They arose from failures … to implement adequate systems to ensure that ESG claims in relation to its superannuation products were accurate, and to monitor and enforce the application of any sustainability exclusions associated with such ESG claims*'.

ASIC Deputy Chair Sarah Court said, '*Today's matter is a strong example to the financial services industry of the greenwashing action we will take. We will continue to monitor the market for ESG-related claims that cannot be validated by evidence to ensure the market is fair and transparent*'.

Having commenced two other civil penalty proceedings in the Federal Court against an investment manager and another superannuation trustee, ASIC remains increasingly active in its fight against greenwashing in the financial services industry.

THE VIEW FROM ABROAD

United Kingdom Seeks to Regulate ESG Ratings

The UK Government intends to propose new legislation for the purpose of regulating ESG ratings providers. This is in response to concerns that the current system is not sufficiently transparent or reliable and is an issue stakeholders and investors would like to see resolved. The soon-to-be-proposed legislation by Finance Minister Rachel Reeves, with a tentative date of 2025, has strong industry support including from the UK Sustainable Investment and Finance Association. This initiative is a continuation of the previous administration's 2023 consultation paper, accessible here.

In practical terms, the legislation would mandate ratings providers to disclose methodologies and conflicts of interest. Further, the legislation would bring ESG ratings providers under the purview of the United Kingdom's Financial Conduct Authority. This move will more closely align the United Kingdom's position with recent developments by the European Union whereby ESG ratings providers are now subject to supervision by the European Securities and Markets Authority. By doing so, the United Kingdom aims to cement its position as a leader in sustainable finance by addressing the current shortfalls in their system to boost overall investor confidence in the UK market.

India's Expansion of Sustainable Finance in Securities Market

India's Securities and Exchange Board (SEBI) has sought to expand the scope of its green debt securities framework, first established in 2017, by introducing a wider array of relevant instruments. The proposed framework will see the inclusion of sustainable securitised debt instruments, namely, social bonds, sustainable bonds, and sustainability-linked bonds. SEBI has released its consultation paper on the proposal which is open for public comment until 6 September 2024.

The aim of these sustainable securitised debt instruments is to diversify the green bond market in India, providing issuers and investors alike with more options and greater flexibility. It is SEBI's intention that this increased diversity will lead to higher levels of capital committed to projects which address ESG-related concerns. This proposal follows an annual record for the Indian market of US$15.6 billion in ESG debt issuance. If such proposal materialises, projects which seek to prioritise broader social and sustainability goals, beyond the conventional

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environmental projects, will receive funding in what has been described as a more holistic approach to sustainable finance. Ultimately, the proposal signifies a strategic shift by SEBI to compete with other large Asian markets, namely China and Japan, to whom India currently falls behind in the scope and volume of sustainable financing activities.

The authors would like to thank graduate Daniel Nastasi and paralegal Isaac Gilmore for their contributions to this alert.

FOOTNOTES

[1] Sustainability collaborations and Australian competition law (accc.gov.au) p 5 [11].
[2] Sustainability collaborations and Australian competition law (accc.gov.au) p 13 [41].
[3] Sustainability collaborations and Australian competition law (accc.gov.au) p 6 [13].

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